No. 76-1428

In the Supreme Court of the United States

OCTOBER TERM, 1976

E. GARRISON ST. CLAIR, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WADE H. McCREE, JR.,
Solicitor General,

BENJAMIN R. CIVILETTI,
Assistant Attorney General,

JEROME M. FEIT,
JOSEPH S. DAVIES, JR.,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

INDEX

CITATIONS

In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1428

E. GARRISON ST. CLAIR, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (App., *infra*[1]) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on March 17, 1977 (Pet. App. A). The petition for a writ of certiorari was filed on April 15, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

[1]The court of appeals affirmed from the bench on March 17, 1977 (Pet. App. 1a). On March 28, 1977, it supplemented its decision with a written opinion, which petitioner did not include in his appendix to his petition for a writ of certiorari. We therefore are filing the court's opinion as an appendix to this brief in opposition.

QUESTIONS PRESENTED

1. Whether there was sufficient evidence to sustain petitioner's mail fraud conviction.

2. Whether petitioner's solicitation of witnesses to misrepresent facts to criminal investigators amounted to obstruction of justice within the meaning and intent of 18 U.S.C. 1510.

3. Whether petitioner's statements at a meeting with an Assistant United States Attorney should have been suppressed on the ground that petitioner's counsel provided ineffective assistance in not warning petitioner that he did not have to incriminate himself.

STATUTES INVOLVED

18 U.S.C. 1341 provides:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Post Office Department, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at

> the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

18 U.S.C. 1510 provides in pertinent part:

> (a) Whoever willfully endeavors by means of bribery, misrepresentation, intimidation, or force or threats thereof to obstruct, delay, or prevent the communication of information relating to a violation of any criminal statute of the United States by any person to a criminal investigator;
>
> * * * * *
>
> Shall be fined not more than $5,000, or imprisoned not more than five years, or both.
>
> (b) As used in this section, the term "criminal investigator" means any individual duly authorized by a department, agency, or armed forces of the United States to conduct or engage in investigations of or prosecutions for violations of the criminal laws of the United States.

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of New York, petitioner was convicted of five counts of mail fraud, in violation of 18 U.S.C. 1341, and two counts of obstruction of justice, in violation of 18 U.S.C. 1510. He was sentenced to concurrent terms of two years' imprisonment on each of the five mail fraud counts, all except six months of which was suspended, and he was ordered to serve three years' probation. On the two counts of

obstruction of justice, he was sentenced to concurrent terms of three years' imprisonment, all except six months of which was suspended, and he was ordered to serve three years' probation. The court ordered that the sentence for obstruction of justice be served consecutively to the sentence for mail fraud (Pet. 5).

1. The evidence showed that petitioner engaged in a scheme to defraud several thousand businesses by billing them for listings in an allegedly new business directory, "The 1976 Presidents' Directory of Business and Commerce in the United States, Special Bicentennial Issue," when in fact petitioner never had obtained or even solicited orders for the publication from the firms and did not print the promised directory Tr. 9.

In December 1975, petitioner ordered printed 3,000 copies of a business envelope directed to "Accounts Payable," a postage paid self-addressed reply envelope, and a solicitation letter, all bearing the name of petitioner's company (Tr. 45-47). The solicitation letter described the directory, solicited the addressee firm's order, and requested the return of the invoice if the firm was not interested in the directory. In addition, petitioner ordered the preparation of a layout for an invoice (Tr. 47). Each invoice billed the firm to which it was directed $75 for a listing in the directory and warned in red letters to remit the invoice within ten days for inclusion in the first edition. Petitioner mailed 2,750 business envelopes containing the invoice and return envelope to various corporations and businesses. (Tr. 50). Seven witnesses, each from a commercial recipient of petitioner's mailings, testified that they had received petitioner's mailings, that pursuant to their normal business practices the mailings were opened in their mail room or accounts payable department and forwarded to them, and that the mailings contained the

invoices but no solicitation letter (Tr. 31-34, 38-40, 69-71, 73-74, 108-110, 118-121, 123-125).

2. On January 23, 1976, petitioner and his counsel attended a meeting at the office of an Assistant United States Attorney in the Eastern District of New York following an in-court civil proceeding pursuant to 39 U.S.C. 3001, *et seq.*,[2] to enjoin petitioner's use of the mails in connection with the billings for his directory. During the meeting petitioner was advised that the government was commencing a criminal investigation of him for mail fraud and that prosecution depended largely on whether the solicitation letter petitioner had printed was in fact mailed with the invoices (S. Tr. 20-21[3]; Tr. 137). At the meeting, petitioner stated that this was his first venture into a mail business and that the solicitation letter had been stuffed into the mailing that contained the invoice by himself and three women—Evangelina Rojas, Kari Hopper, and Mary Ann Claire (Tr. 137). Petitioner was advised that the government would interview these three women and that he should take care not to attempt to influence their testimony, as this might be construed as an obstruction of justice (Tr. 138). Petitioner indicated that he would speak to the three women only to advise them that the government would be contacting them (Tr. 138).

Shortly after the meeting on January 23, 1976, Evangelina Rojas was interviewed by the government. She corroborated petitioner's story about stuffing the envelopes

---

[2]On January 8, 1976, the Postal Service had placed an administrative "stop" on petitioner's mailings (Tr. 156).

[3]"S. Tr." refers to the pre-trial suppression hearing held on July 26, 1976.

and specifically stated that she recalled placing the solicitation letter in the envelope (Tr. 139, 141). She also confirmed that Mary Ann Claire and Kari Hopper assisted in stuffing the envelopes (Tr. 141). When these two women were located, however, they both contradicted Rojas's version of the events (Tr. 146-147). Kari Hopper testified that petitioner spoke to her and Mary Ann Claire on the evening of January 23, 1976, and told them that somebody would be contacting them and that he wanted them to tell this person that they had stuffed envelopes for him with a return envelope, letter, and invoice (Tr. 173-174, 194, 213-214). Kari Hopper and Mary Ann Claire stated they had never actually stuffed the letters for petitioner, heard of petitioner's company, or seen the solicitation letter and other material petitioner had printed (Tr. 174-175, 197).

3. Petitioner neither testified nor presented any witnesses. The theory of his defense was that the December 1975 mailings constituted a legitimate solicitation of business rather than a billing for services which had not been rendered, since, as petitioner had asserted to the Assistant United States Attorney, each envelope contained a solicitation letter. It was his position that Kari Hopper and Mary Ann Claire had in fact assisted in the mailing and were lying in denying their involvement for fear of losing their jobs (*e.g.*, Tr. 304-305).

4. The court of appeals affirmed. It issued an opinion addressing only petitioner's claim that the evidence did not establish an obstruction of justice in violation of 18 U.S.C. 1510 (App., *infra*). The court of appeals held that Section 1510 is violated "whenever an individual induces or attempts to induce another person to make a material misrepresentation to a criminal investigator"

(*id.* at 3a), and that the evidence demonstrated an attempt by petitioner to induce Hopper and Claire to lie to investigators (*id.* at 2a).[4]

ARGUMENT

1. There is no basis for petitioner's contention (Pet. 12-19) that the evidence was insufficient to support his mail fraud conviction.

a. Petitioner argues first (Pet. 12) that the prosecution failed to prove that he did not intend subsequently to publish a directory, and therefore it failed to prove that he had an intent to defraud even if he did not send solicitation letters with his invoices. However, the evidence establishing petitioner's failure to include solicitation letters with his invoices, his subsequent attempts to conceal that fact by suborning false statements from his friends, and his addressing the invoices to the "Accounts Payable" departments of the addressees, amply supported the jury's conclusion that petitioner had devised a scheme to obtain money from commercial establishments solely on the basis of the false representation implicit in the invoice and without an intent to provide anything in return.[5] The fact that the Postal Service stopped delivering petitioner's invoices 19 days after he began the mailings does not undermine the jury's conclusion in that respect.

---

[4]The court held that the district court's charge to the jury to the effect that it could convict only if it found that petitioner had actually made misrepresentations to Hopper and Claire was unduly favorable to petitioner, but that "[i]mplicit in the jury's verdicts of conviction under §1510 were findings that [petitioner] had attempted to persuade Hopper and Claire to lie to the criminal investigators" (App., *infra*, 5a).

[5]The district court instructed the jury that if it found that petitioner did intend to furnish proof sheets of a directory it should find that he did not engage in fraud (Tr. 335). However, even if petitioner did intend to publish a directory of the establishments

United States v. *Regent Office Supply Co.*, 421 F. 2d 1174 (C.A. 2), on which petitioner relies, is wholly inapposite. There the court held that a sales agent's solicitation of a purchase by falsely representing to the customer, *inter alia*, that the agent had been referred by a friend of the customer, was not a scheme to defraud because there was no showing in that case of actual or reasonably anticipated injury to anyone. 421 F. 2d at 1181-1182.[6] Here, in contrast, the evidence abundantly showed that petitioner did not solicit a purchase at all, but rather billed for a nonexistent purchase, to the obvious injury of his victims.

b. Petitioner next argues (Pet. 15-17) that there was insufficient proof that he did not include solicitation letters in his mailings. Seven witnesses testified that they received petitioner's mailings, that those mailings were forwarded to them in the normal course of business, and that the mailings contained invoices but no

---

that paid his invoices, his scheme still would have been fraudulent within the meaning of 18 U.S.C. 1341. An invoice by its nature represents that the person submitting it is entitled to money for services already rendered or contracted for, and petitioner clearly sought to obtain money from businesses on the basis of that false representation, not on the basis of the business' genuine desire to be included in a directory. As the indictment here alleged (Tr. 327), petitioner's mailings falsely represented "that the addressees to whom the invoices were sent had previously ordered listings in the Directory." Whether or not petitioner may have intended to publish the directory is therefore immaterial, and the court's instructions on the matter provided petitioner a greater benefit than the law requires.

[6]The court, however, cited numerous cases in which false representations in connection with a purchase solicitation were held to violate the mail fraud statute. See 421 F. 2d at 1180-1182.

solicitation letters.[7] Petitioner offered no proof that anyone had received solicitation letters. Furthermore, the evidence showed that petitioner attempted to persuade two other persons falsely to state that they placed solicitation letters in envelopes. In those circumstances the jury could conclude beyond a reasonable doubt that petitioner did not include solicitation letters in his mailings.[8]

2. Petitioner argues that his conduct was not covered by 18 U.S.C. 1510, which makes it a crime to "willfully endeavor by means of bribery, misrepresentation, intimidation, or force or threats thereof to obstruct, delay, or prevent the communication of information relating to a violation of any criminal statute of the United States by any person to a criminal investigator," on the ground that his communications did not intimidate or injure the two witnesses. However, as explained in the appended opinion of the court of appeals, on which we rely, the legislative history of Section 1510 demonstrates that the provision applies

---

[7]Petitioner's suggestion (Pet. 17) that there was a possibility, amounting to a reasonable doubt, that the solicitation letters were removed from the envelopes by ministerial personnel in each establishment's mailing room before the letters were forwarded to the witnesses is frivolous. Similarly there is no merit to petitioner's contention that the witness' testimony that they did not receive any solicitation letter was hearsay. Those witnesses testified only about normal practices in their businesses and what they themselves received; not about what someone else said he did or did not receive.

[8]The cases on which petitioner relies (Pet. 16-17) are not to the contrary. For example, *United States* v. *Rabinowitz*, 327 F. 2d 62, 81 (C.A. 6) did not hold, as petitioner asserts, that testimony of a small percentage of alleged victims is insufficient to establish that a false representation was made. Rather, it held that the representations proved to have been made were not false, but at most "sales talk" which did not establish an intent to defraud.

"whenever an individual induces or attempts to induce another person to make a material misrepresentation to a criminal investigator" (App., *infra*, 3a). The House Committee Report on Section 1510 (H.R. Rep. No. 658, 90th Cong., 1st Sess., p. 3 (1967)), quoted by the court of appeals (App., *infra*, 4a) leaves no room for doubt on the issue:

> Your committee wishes to make abundantly clear the meaning of the term "misrepresentation" as used in this act. It is our intention that the actual procurement by a party of another party's misrepresentation or silence to a Federal investigator would be covered even though such procurement was not achieved by any misrepresentation. At the same time, it is also our intention that procurement of a witness' communication or silence to a Federal investigator by means of a misrepresentation on the part of the procurer is also covered under the act.

See also 113 Cong. Rec. 29404 (1967). Petitioner's attempt to induce Hopper and Claire to lie to investigators was clearly demonstrated here.

3. Petitioner contends (Pet. 23-27) that the statements he made to the Assistant United States Attorney on January 23, 1976—*i.e.*, that three women had assisted him in enclosing the solicitation letters in the mailings—and the fruits thereof, should have been suppressed because his counsel was ineffective in not warning him that he had a right to remain silent. This claim is insubstantial, since the statements were made well before petitioner was either arrested or indicted, and therefore his Sixth Amendment right to counsel had not yet attached. See *Kirby* v. *Illinois*, 406 U.S. 682.

Moreover, petitioner's claim that his counsel was ineffective or incompetent is unsupported by the record.[9] At the suppression hearing petitioner's counsel explained that he had urged petitioner to give the government the names of the women because petitioner had insisted to counsel that their stories would exculpate him (S. Tr. 55). In these circumstances, petitioner's counsel can hardly be held to have proffered unsound advice (cf. *McMann* v. *Richardson*, 397 U.S. 759) because he believed petitioner and advised his client to volunteer the information in the hope of forestalling prosecution.[10]

---

[9]Petitioner concedes (Pet. 26) that he had no right to be given *Miranda* warnings by the Assistant United States Attorney, since the interview was non-custodial. See *Oregon* v. *Mathison*, No. 76-201, decided January 25, 1977.

[10]Nor is there any basis for petitioner's suggestion (Pet. 26-27) that either Judge Weinstein's statements on January 23 or the consent agreement entered on January 26 relating to possible prosecution under 39 U.S.C. 3005 deluded petitioner during his January 23 interview into believing that he was immune from further criminal prosecution or that he could lie with impunity about material facts. Indeed, at the interview, the Assistant U.S. Attorney specifically advised petitioner that he was conducting a criminal investigation (Pet. App. 7a), and the consent decree specifically provided that it was not "a defense or release of the undersigned of any responsibility for violation of any other statute" (Tr. 227).

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. McCREE, JR.,
Solicitor General.

BENJAMIN R. CIVILETTI,
Assistant Attorney General.

JEROME M. FEIT,
JOSEPH S. DAVIES, JR.
Attorneys.

JUNE 1977.

DOJ-1977-06

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 857—September Term, 1976.

(Argued March 17, 1977 Decided March 17, 1977
Opinion March 28, 1977.)

Docket No. 76-1541

UNITED STATES OF AMERICA,

Appellee,

v.

E. GARRISON ST. CLAIR,

Appellant.

Before:

LUMBARD and TIMBERS, *Circuit Judges,*
and DAVIS, *Court of Claims Judge.**

Appeal from convictions of mail fraud, 18 U.S.C. §1341, and obstruction of justice, 18 U.S.C. §1510, after a jury trial before Pratt, J., in the Eastern District.

Affirmed.

DOUGLAS J. KRAMER, Assistant United States Attorney (David G. Trager, United States Attorney for the Eastern District of New York, and Alvin A. Schall, Assistant United States Attorney, on the brief), *for Appellee.*

---

*Sitting by designation.

HARVEY J. MICHELMAN, New York, N.Y. (Michelman & Michelman, New York, N.Y., on the brief), *for Appellant.*

PER CURIAM:

This is an appeal from convictions, after jury trial in the Eastern District, on five counts of mail fraud, 18 U.S.C. §1341, and two counts of obstruction of justice, 18 U.S.C. §1510. We announced our decision affirming the convictions at oral argument. Because the case does raise an issue of first impression in this court regarding the interpretation of 18 U.S.C. §1510, and because we think the district court's instruction to the jury unduly limited the scope of the statute, we supplement our decision with a written opinion.

The defendant was charged with three counts of obstruction of justice. The relevant facts are recounted in Judge Pratt's opinion in the district court, 418 F. Supp. 201. While under investigation for mail fraud, the defendant St. Clair gave government investigators the names of three women friends of his who he said could corroborate his innocence, Evangeline Rojas, Kari Hopper, and Mary Ann Claire. The evidence at trial demonstrated that defendant then asked the women to make certain false statements on his behalf if they were contacted by the investigators. One of the women, Evangeline Rojas, went along with his suggestion and did lie to investigators. However, the defendant was unable to persuade the other two women; his efforts at playing down the seriousness of the matter were unsuccessful with them, and they both eventually told the investigators about St. Clair's efforts to have them make false statements.

18 U.S.C. §1510 makes it a crime to "willfully endeavor by means of bribery, misrepresentation, intimidation, or force or threats thereof to obstruct, delay, or prevent the communication of information relating to a violation of any criminal statute of the United States by any person to a criminal investigator." At the close of trial Judge Pratt dismissed the obstruction of justice count relating to Rojas and instructed the jury that they could convict on the other two counts only if they found that the defendant had actually made a misrepresentation to Hopper or Claire. His reasoning, set forth in his post-trial opinion, was that §1510 applies only where a person seeking to obstruct the communication of information to an investigator has himself made a misrepresentation to a potential witness. On appeal, the defendant argues that the evidence was insufficient to support convictions on the district court's theory. We disagree. Moreover, there can be no complaint regarding the trial judge's instruction to the jury as it was unduly favorable to the defendant.

We conclude that §1510 is violated whenever an individual induces or attempts to induce another person to make a material misrepresentation to a criminal investigator. From the legislative history of P.L. 90-123, enacted in 1967, it is abundantly clear that Congress specifically intended such cases to be covered when it included the word "misrepresentation" in §1510. The House committee report stated:

> Your committee wishes to make abundantly clear the meaning of the term "misrepresentation" as used in this act. *It is our intention that the actual procurement by a party of another party's misrepresentation or silence to a Federal investigator would be covered even though such procurement was not achieved by any misrepresentation.* At the same time, it is also

> our intention that procurement of a witness' communication or silence to a Federal investigator by means of a misrepresentation on the part of the procurer is also covered under the act.

H.R. Rep. No. 658, 90th Cong., 1st Sess., in 1967 U.S. Code Cong. & Adm. News 1762 (emphasis supplied). Subsequent House debates on whether "misrepresentation" should be omitted from the statute confirm the committee's interpretation. Thus, Representative Cromer stated that the word "misrepresentation" was included specifically in order to cover those cases where the government's failure to obtain testimony is due to a code of silence or loyalty between the potential witness and the defendant. 113 Cong. Rec. 29,404 (Oct. 19, 1967). And several opponents of inclusion complained that "[t]he misrepresentation of facts by individuals contacted by law enforcement officers is an entirely different matter from bribery, intimidation, or the use of force to obstruct criminal investigations. . . ." *Additional views of Basil L. Whitner and William L. Hungate to House Rep. No. 658,* 1967 U.S. Code Cong. & Admin. News 1765-66.[1]

---

[1]The district court relied on portions of the House committee report which indicate that a principal objective of §1510 was the protection of informants and potential witnesses. However, nothing in the report supports the district court's conclusion that this was the only purpose. The court apparently took the second sentence of the following paragraph out of context:

> This committee wishes to make it abundantly clear that this legislation cannot be used by a Federal investigator to intimidate or harass a potential witness or informant by reason of his giving false or misleading information about a criminal violation. The sole purpose of the act is to protect informants and witnesses against intimidation or injury by third parties with the purpose of preventing or discouraging the informants or witnesses from supplying or communicating information to the Federal investigator. The informants or witnesses cannot themselves be subject to prosecution under this act on account of any information they may furnish to the investigator.

H.R. Rep. No. 658, *supra.*

Our interpretation fully comports with the language of the statute itself. To persuade or to attempt to persuade someone to lie to investigators is to "endeavor by means of . . . misrepresentation . . . to obstruct . . . the communication of information." Nothing in the statutory language requires that the misrepresentation be made by the defendant; it is enough that he may be endeavoring to obstruct the justice by means of misrepresentation by a potential witness.

Finally, this reading of §1510 is consistent with established principles of statutory interpretation as summarized in *United States* v. *Bass,* 404 U.S. 336, 347-48 (1971). The defendant has received fair warning of what is proscribed; no one would be surprised to learn that soliciting misrepresentations by potential witnesses is illegal. With the statute and its unambiguous legislative history, Congress has clearly defined the criminal activity at issue.

Implicit in the jury's verdicts of conviction under §1510 were findings that the defendant had attempted to persuade Hopper and Claire to lie to the criminal investigators. Accordingly, our resolution of the issue of statutory interpretation disposes of the appellant's claim.

Affirmed.